93-296
NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1993 TERM

FRANK PAUL CIAMARICONE, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTION PRESENTED

DID THE VIRGINIA SUPREME COURT ERR IN DENYING PETITIONER'S PETITION FOR APPEAL AFTER THE TRIAL COURT ERRED IN OVERRULING THE PETITIONER'S MOTION TO SUPPRESS EVIDENCE THAT WAS SEIZED IN VIOLATION OF UNITED STATES CONSTITUTION AMENDMENT IV?

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REPORTS OF OPINIONS DELIVERED IN THE PETITIONER'S CASE

The Court of Appeals of Virginia, February 18, 1993, Record No. 1596-92-2 (Unpublished) (App. p. 1).

The Supreme Court of Virginia, April 22, 1993, Record No. 930385 (Unpublished) (App. p. 7).

CONSTITUTIONAL PROVISION

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

JURISDICTIONAL STATEMENT

The Petitioner's Motion to Suppress evidence seized in violation of U.S. CONST. amend. IV (App. p. 10) was denied during a pre-trial hearing (App. p. 14) by the Chesterfield County Circuit Court on February 7, 1992. After being granted leave to file a Memorandum of Law (App. p. 19) and a motion to amend motion to suppress evidence seized pursuant to a search warrant (App. p. 24), the defendant renewed his motion to suppress the evidence which was overruled on February 11, 1992. (App. p. 28) The petitioner's petition for appeal was denied by the Court of Appeals of Virginia on February 18, 1993. (App. p. 1) The petitioner then filed a petition for appeal with the

Supreme Court of Virginia which was denied on April 22, 1993. (App. p. 8)

On July 7, 1993, the petitioner submitted to this court a petition for extension of time within which to file a petition for a writ of certiorari. The petition for extension, Application No. A-27, was granted on July 9, 1993, by the Chief Justice (App. p. 29). The petitioner was given until August 20, 1993, to file this petition for Writ of Certiorari.

The jurisdiction of this Court to review the judgment by a writ of certiorari is invoked under the provisions of 28 United States Code § 1257.

STATEMENT OF THE CASE

LEGEND

S. = Transcript of February 7, 1992 Suppression of Hearing

Tr. = Transcript of February 11, 1992 Trial

D. = Transcript of March 24, 1992 Dispositional (Sentencing) Hearing

PCA. = Petition for Appeal to the Virginia Court of Appeals

PSC. = Petition for Appeal to the Supreme Court of Virginia

On August 23, 1991, a helicopter containing police flew over Chesterfield County, Virginia, and spotted a field belonging to Petitioner. The police officers saw that the field contained thirty-one marijuana plants which were growing in buckets surrounded by wire. (Tr. 49, 50). Some of the buckets contained reinforcement bars to support the plants. (Tr. 49, 50). Near the

plants, the police found a couple of bags of potting soil. (Tr. 50). The only path from the marijuana plants was a worn path which led to the fenced-in portion of Petitioner's property, on which his home is located. (Tr. 128). While the police were in the field containing the marijuana, they looked into Petitioner's backyard and saw wire, buckets and reinforcement barbs similar to those found with the marijuana plants in the field. (Tr. 11).

On August 23, 1991, police obtained a search warrant for Petitioner's home which they executed that same day. (Tr. 13). As a result of the search of Petitioner's home, the police seized a hemostat (medical tweezers) (S. 8, 23) and a small amount of marijuana residue which was found on a tray on top of the

refrigerator. (Tr. 53, 99, 102). The police also found a small amount of plant material inside the microwave which appeared to be marijuana, but was too small an amount to be analyzed by the laboratory. (Tr. 53, 99, 102).

Petitioner was arrested and charged by warrant with possessing and manufacturing marijuana with intent to distribute. The police stripped the leaves from the stalks of the plants and submitted them to the State Consolidated Laboratories for analysis (Tr. 94, 96, 101). The laboratory reported that the plants contained 3.4 pounds of marijuana. (Tr. 101).

A pre-trial hearing was held on February 7, 1991, during which Petitioner made the following motion to

suppress the evidence that was seized from his home:

COMES NOW the Defendant, by his undersigned counsel, and moves this Honorable Court to order suppressed from the introduction into evidence any and all evidence seized or obtained pursuant to a search warrant. The Defendant contends that the affidavit is a barebones affidavit. It is clear under the Fourth Amendment of the United States Constitution that an affidavit must provide the Magistrate with the substantial basis for determining the existence of probable cause, and a wholly conclusory statement fails to meet this requirement. Sufficient information must be presented to the Magistrate to allow that official to determine probable cause; his action

cannot be a mere ratification of the bare conclusions of others. Illinois v. Gates, 462 U.S. 213, 239 (1983). If an affidavit fails to demonstrate adequately the informant's veracity or reliability, or his basis of knowledge so as to support probable cause for the issuance of the arrest warrant, a court can conclude that the affidavit is barebones and incapable of supporting a finding of probable cause. United States v. Jackson, 818 F. 2d 345, 350 (5th Cir. 1987). See United States v. Leon, 468 U.S. 897, 914 (1984)....

substances nor such tools, seeds, or other items related to the manufacturing of marijuana. This contention by the affiant that items that he was seeking would be most likely located in the

Defendant's home was unsubstantiated. This was purely a speculative and conclusory determination made by the affiant. The affiant also failed to explain how he had such knowledge or how often his knowledge on other marijuana cases had been correct or incorrect.

WHEREFORE, the Defendant contents that the police lacked sufficient basis to search his residence. The Defendant, therefore, contends that all items seized from his residence and from the curtilage should be suppressed. (App. p. 10)

During the pre-trial hearing, petitioner made the following oral argument in support of his motion to suppress:

The first motion perhaps in point of time should be considered would be

the motion to suppress looking at the face of the affidavit where we ask the court to consider interpreting whether or not there is sufficient probable cause or whether there is a barebones affidavit that would not be saved by the good faith exception...

It will be my argument to the Court not only that it fails under the constitutional law from the United States Supreme Court that the State must apply, but also that the Constitution of Virginia does not include a good faith exception... (App. p. 15).

The Court overruled the motion while allowing Petitioner the opportunity to submit a memorandum of law supporting his motion. (App. p. 14) After reviewing the amendment to Petitioner's motion to suppress the

evidence, the court affirmed its earlier ruling denying the motion. (App. p. 28)

Petitioner was tried and found guilty by a jury which recommended a sentence of eight years in the Virginia State Penitentiary with a fine of $3,500. (Tr. 198). The jury's verdict was affirmed by the judge and petitioner was ordered to serve the sentence recommended by the jury and to pay the fine fixed by the jury. (D. 26).

In his petitions for appeal, petitioner challenged the issuance of the search warrant for his home on the basis that the affidavit provided to the magistrate was insufficient on its face to raise probable cause that seizable items would be found.

The following argument was included in the petitions for appeal:

It is clear from the Fourth Amendment of the United States Constitution and the Virginia Constitution that an affidavit must provide the magistrate with the substantial basis for determining the existence of probable cause. In the instant case, the affidavit fails to so provide and is defective on its face.

"The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The duty of

the reviewing court is "simply to ensure that the magistrate had a substantial 'basis for...conclud[ing]' that probable cause existed." Id., at 238-239 (quoting Jones v. United States, 362 U.S. 257, 271 (1960) (App. p. 30).

Petitioner's petitions for appeal continue:

Good Faith Exception

Once a determination is made that the magistrate lacked a "substantial basis for finding that probable cause existed, the court must determine if the good faith exception to the exclusionary rule, announced in United States v. Leon, 468 U.S. 897 (1984), is applicable. The good faith exception will not apply where"...(3) the warrant was based on an affidavit so lacking in probable cause as to render official

belief in its existence unreasonable..." Atkins v. Commonwealth, 9 Va. App. p. 462, 464; 389 S.E.2d 179, 180 (1990) (citing Leon, 468 U.S. at 923).

It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched. No such facts were stated in the instant affidavit. The affiant merely stated his hunch that there might be contraband found there. No particularized information as to contraband existing inside Defendant's home appears on the affidavit. Thus, any official belief in the existence of probable cause must be considered unreasonable. Leon, then does not apply. (App. p. 30)

Petitioner's timely petitions for appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia both contained the preceding language and were both denied.

ARGUMENT

The trial court's ruling on Petitioner's motion to suppress and the decisions of the Court of Appeals of Virginia and the Supreme Court of Virginia denying Mr. Ciamaricone's petitions for appeal are in conflict with the decisions of this Court. This Court should grant Mr. Ciamaricone a writ of certiorari, in accordance with Rule 10.1(c) of the Rules of the United States Supreme Court, so that his case may be decided in accordance with the decisions of this Court.

The U.S. CONST. amend. IV requires that a search warrant be based on probable cause and supported by oath or affirmation. The affidavit that is presented to the magistrate with the application for a search warrant, "must

provide the magistrate with a substantial basis for determining the existence of probable cause, and [a] wholly conclusory statement fail[s] to meet this requirement...Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action can not be a mere ratification of the barebones conclusions of other." Illinois v. Gates, 462 U.S. 213, 239; 76 L. Ed. 2d 527, 549; 103 S.Ct. 2317, 2333 (1983).

The information provided in the affidavit must allow, "the magistrate to perform his detached function and not act as a rubber stamp for the police." U.S. v. Ventresca, 380 U.S. 102, 109; 13 L. Ed. 684, 69; 85 S.Ct. 741, 746 (1965). In performing this function, a

magistrate must be able to review the affidavit and determine if it provides, "probable cause to believe that the legitimate object of a search is located in a particular place..." Steagald v. United States, 451 U.S. 204, 213; 68 L. Ed. 2d 38, 46; 101 S.Ct. 1642, 1648 (1981). "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of suspicion is not enough." Aguilar v. Texas, 378 U.S. 108, 112; 12 L. Ed. 2d. 723, 727; 84 S.Ct. 1509, 1512 (1964).

In the case at bar, the facts contained in the affidavit supporting the application for the search warrant

were combined with the conclusions and suspicions of the officer who applied for the warrant. The material facts contained in the affidavit are as follows:

On this date August 23, 1991, while on combined operation with the Va. State P.D., the U.S. Air National Guard and the Chesterfield County P.D. Narcotics Unit, approximately thirty-one (31) marijuana plants were observed from the air. The plants were potted in black plastic buckets with wire surrounding the plants. The location where the plants were found is behind the aforementioned location described in section two of this document. Also observed was a worn footpath leading to the rear of the aforementioned location where there are black plastic buckets

and wire matching the ones the plants were in located in the yard of the location to be searched. There were no other paths leading to the plants. It is your affiant's knowledge that tools, seeds, and other items related to the manufacturing of marijuana plants are normally kept inside the residences of persons growing marijuana. (App. p. 39)

This affidavit fails to meet the criteria set out by the previous decisions of this court. This court has required that an affidavit supporting a search warrant contain facts that are sufficient to allow the magistrate to make an independent evaluation of probable cause. Based on the evidence found by the police, the affiant in the case at bar made the assumption that the owner of the house was growing the

marijuana that was found. The officer then added his personal knowledge of marijuana cultivation to his initial assumption and made a second assumption.

The officer's second assumption was that evidence of marijuana manufacturing would be found in the house. The officer's affidavit contained assumptions based solely his interpretation of the situation rather than facts which would provide a basis for a probable cause ruling. By incorporating his assumptions into the affidavit, the police officer failed to provide a sufficient factual basis for a finding of probable cause. In addition, the officer prevented the magistrate from making the independent evaluation of the facts alleged to support the finding of probable cause that is

required by the decisions of this Court. The affidavit submitted by the officer failed to demonstrate probable cause and the evidence found during the search should have been suppressed by the trial court.

However, this court has created an exception to the exclusionary rule that allows the admission of evidence that is seized by officers in good faith reliance on a search warrant issued by a magistrate. United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677; 104 S.Ct. 3405 (1984). This decision was based on the fact that the exclusionary rule was intended to serve as a deterrent to police misconduct. The Court, in Leon, reasoned that the exclusionary rule should not be enforced when the police

act in good faith reliance on what they believe to be a valid search warrant.

In Leon, this court recognized an exception to the good faith rule it announced because a police officer, "could not manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in probable cause as to render official belief in its existence entirely unreasonable.'" U.S. v. Leon, 468 U.S. 897, 923, 82 L. Ed. 2d 677, 699, 104 S.Ct. 3405, 3421 (1984) (citing Brown v. Illinois, 422 U.S. 590, 610-611, 45 L. Ed. 2d 416, 431, 95 S. Ct. 2254, 2265 (1975).

In seeking a warrant to search Petioner's home, the officer submitted an affidavit that was based on evidence he had discovered coupled with two assumptions that he had made. It is

unreasonable to believe that the officer thought that his assumptions could suffice as evidence of probable cause. In this case, the items that were seized should have been excluded under the exception to Leon in order to act as a deterrent to police misconduct and to protect the rights guaranteed to Petitioner by the U.S. CONST. amend. IV.

Respectfully submitted,

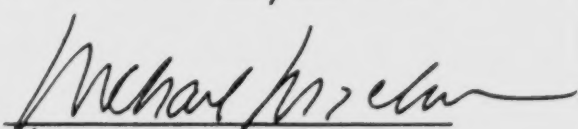
FRANK PAUL CIAMARICONE

By: _____
Counsel

Michael Morchower, Esq.
Morchower, Luxton & Whaley
Nine East Franklin Street
Richmond, Virginia 23219
(804) 643-0147

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari has been forward by first-class U.S. Mail, postage prepaid, to Stephen Rosenthal, Esquire at 101 N. 8th Street, Richmond, Virginia 23219 on this 19 day of August, 1993.



Michael Morchower

APPENDIX

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Opinion in Petitioner's Case From the Supreme Court of Virginia. 8

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V I R G I N I A:

In the Court of Appeals of Virginia on Thursday the 18th day of February, 1993.

Frank Paul Ciamaricone, Appellant

against Record No. 1596-92-2

Circuit Court No. CR91F01461

Commonwealth of Virginia, Appellee.

From the Circuit Court of Chesterfield County

Before Chief Judge Koontz, Retired Judges Cole and Godwin*

This petition for appeal is denied for the following reasons:

Frank Paul Ciamaricone (Ciamaricone) was convicted in a jury trial of manufacturing marijuana not for his own use.

Ciamaricone first contends that the trial court erred in refusing to

suppress evidence seized from inside his home because there was not probable cause to support the issuance of the search warrant. The issuing magistrate must determine "whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). "[T]he duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for ...conclud[ing]' that probable cause existed." Id. at 238-39 (citation omitted). Here, the affiant stated that thirty-one marijuana plants in black plastic buckets were

seen in an area enclosed by barbed wire; a worn foot path led from this area to Ciamaricone's backyard; and similar buckets and barbed wire were in the backyard. The affiant further stated that based on his knowledge and experience, items related to the manufacturing of marijuana are normally kept inside the house of someone growing marijuana. We find that this evidence provided the magistrate with a substantial basis for finding probable cause.

We find no merit in Ciamaricone's contention that the trial court erred in granting the Commonwealth's motion to amend the indictment. "An indictment may be amended 'provided the amendment does not change the nature or character of the offense charged.'" Hall v.

Commonwealth, 2 Va. App. 159, 162-63, 342 S.E.2d 640, 641-42 (1986) (citing Code § 19.2-231). Here, the same conduct was charged in both the original indictment and the amended indictment. Thus, Ciamaricone was on notice of the charge. The original indictment, like the amended indictment, charged a felony. Therefore, the amendment did not change the nature or character of the offense charged.

Ciamaricone also contends that the evidence is insufficient to prove that he was the criminal agent and that the marijuana was not for his personal use. "When considering the sufficiency of the evidence on appeal of a criminal conviction, we must view all the evidence in the light most favorable to the Commonwealth and accord to the

evidence all reasonable inferences fairly deducible therefrom." Traverso v. Commonwealth, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988). "The jury's verdict will not be disturbed on appeal unless it is plainly wrong or without evidence to support it." Id. We find that sufficient evidence, including the expert's testimony that 3.4 pounds of marijuana is inconsistent with personal use and the testimony that Ciamaricone's wife did not use or manufacture marijuana, supports the verdict.

Finally, Ciamaricone contends that the trial court erred in refusing to suppress his statement to the media regarding his use of marijuana. Because the jury had already heard, without objection from defense counsel, Detective Bromseth's testimony that

Ciamaricone had told him he had not smoked marijuana in three years, we find no error in the introduction of the same evidence. See Penny v. Commonwealth, 6 Va App. 494, 497, 370 S.E.2d 314, 316 (1988).

The trial court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

---

*Retired Judges Marvin F. Cole and James C. Godwin took part in the consideration in this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:

Patricia G. Davis, Clerk

By: Marty W. Ring

Deputy Clerk

V I R G I N I A:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday, the 22nd day of April, 1993.

Frank Paul Ciamaricone, Appellant,

against Record No. 930385
Court of Appeals No. 1596-92-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Chesterfield County shall allow court-appointed counsel the fee set forth below and also

his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

A Copy,

Teste:

David B. Beach, Clerk

By: Deputy Clerk

V I R G I N I A:

IN THE CIRCUIT COURT
OF CHESTERFIELD COUNTY

COMMONWEALTH OF VIRGINIA, Plaintiff,

v.

FRANK CIAMARICONE, Defendant.

MOTION TO SUPPRESS

COMES NOW the Defendant, by his undersigned counsel, and moves this Honorable Court to order suppressed from the introduction into evidence any and all evidence seized or obtained pursuant to a search warrant. The Defendant contends that the affidavit is a barebones affidavit. It is clear under the Fourth Amendment of the United States Constitution that an affidavit must provide the Magistrate with the substantial basis for determining the existence of probable cause, and a wholly conclusory statement fails to

meet this requirement. Sufficient information must be presented to the Magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. Illinois v. Gates, 462 U.S. 213, 239 (1983). If an affidavit fails to demonstrate adequately, the informant's veracity, or reliability, or his basis of knowledge so as to support probable cause for the issuance of the arrest warrant, a court can conclude that the affidavit is barebones and incapability of supporting a finding of probable cause. United States v. Jackson, 818 F. 2d 345, 350 (5th Cir. 1987). See United States v. Leon, 468 U.S. 897, 914 (1984).

substances nor such tools, seeds, or other items related to the manufacturing

of marijuana. This contention by the affiant that items that he was seeking would be most likely located in the Defendant's home was unsubstantiated. This was purely a speculative and conclusory determination made by the affiant. The affiant also failed to explain how he had such knowledge or how often his knowledge on other marijuana cases had been correct or incorrect.

WHEREFORE, the Defendant contends that the police lacked sufficient basis to search his residence. The Defendant, therefore, contends that all items seized from his residence and from the curtilage should be suppressed.

FRANK PAUL CIAMARICONE

By: _____
Of Counsel

Charles C. Cosby, Jr.
Counsel for Defendant
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(804) 780-1729

Pre-trial Hearing, Pages 14 & 15

THE COURT: Well, I haven't read your memorandum as far as what you're going to offer; but based on what you've given me, I'm inclined to overrule your motion.

MR. COSBY: All right, Your Honor. I will file the memorandum; and perhaps the Court would -- I understand the Court's ruling or preliminary ruling at this point; but view it in the -- view it and make a final ruling after I file the memorandum on Monday.

THE COURT: Unless your memorandum changes my mind, I'm inclined to overrule your motion.

PRETRIAL HEARING - Pages 4, 5 and 6

THE COURT: I believe you filed the motion, Mr. Cosby.

MR. COSBY: Yes, sir, Judge. There are a number of motions. I filed a motion to suppress evidence seized pursuant to the search warrant. I have also filed a motion to suppress statements made to the police -- a second motion to suppress defendant's statements to the police, based on the fruit of the poisonous tree from the -- What we're contending is an illegal search, and also a motion to suppress evidence seized pursuant to the search warrant due to faulty execution, questioning whether they knocked unannounced.

The first motion that we might want to take up, if the Court would allow, would be the --

THE COURT: What case are you on this time? Is this the --

MR. COSBY: Ciamaricone.

THE COURT: All right.

MR. COSBY: The first motion perhaps in point of time that should be considered would be the motion to suppress looking at the face of the search warrant and the affidavit where we ask the Court to consider interpreting whether or not there is sufficient probable cause or whether there is a bare bones affidavit that would not be saved by the good faith exception.

Let me give the Court -- I think there's a copy of the search warrant in

the file; but I have another copy for the Court that we would move to introduce as a defense exhibit with the affidavit attached -- as Defense No. 1.

NOTE: The above-referred-to search warrant was marked and filed as Defendant's Exhibit B.

THE COURT: All right. I have the search warrant.

MR. COSBY: All right. I would also like to ask the Court's permission to amend the motion to suppress as to the search and seizure to also include a contention that the search warrant fails under the Constitution of Virginia.

It will be my argument to the Court not only that it fails under the constitutional law from the United States Supreme Court that the State must apply, but also that the Constitution of

Virginia does not include a good faith exception; and I will cite to the Court the case of Miles versus Commonwealth with a dissenting opinion from Justice Benton -- or an opinion, where he mentions the fact that the North Carolina Supreme Court has found under a similar State Constitution that no good faith exception exists in North Carolina; and by comparison, I'm arguing that there is no good faith exception to save a search warrant under the Virginia Constitution. And I will make more mention of that at the appropriate time; but I would like to amend my motion to suppress to also include that contention.

THE COURT: Have you filed it?

MR. COSBY: I have not filed it,

V I R G I N I A:

IN THE CIRCUIT COURT
OF CHESTERFIELD COUNTY

COMMONWEALTH OF VIRGINIA, Plaintiff,

v.

FRANK CIAMARICONE, Defendant.

MEMORANDUM OF LAW

The Defendant has raised the point in his Motion to Suppress hearing that the items seized under the search warrant should be suppressed under State law. The Virginia Constitution Article I, §10 states that "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

In reading this portion of the Virginia Constitution, the Court must also read Virginia Code §192-60 which states the following; to-wit:

> A person aggrieved by an alleged unlawful search or seizure may move the Court to return any seized property and to suppress it for use as evidence. The Court shall receive evidence on any issue or fact necessary to the decision of the motion. If the motion is granted by a Court of record, any seized property shall be restored as soon as practicable unless otherwise subject to lawful detention, **and such property shall not be admissible in**

evidence at any hearing or trial. If the motion is granted by a Court not of record, such property shall not be admissible in evidence at any hearing or trial before that Court, but the ruling shall have no effect on any hearing or trial in a court of record.

In the case of Miles v. Commonwealth, ____ Va. App. ____ Record No. 0784-90-2 (September 10, 1991) a case dealing with the good faith exception, Judge Benton in his dissent stated in Footnote #1 that no issue of State law was raised by appellant with respect to the good faith exception and cited State v. Carter, 332 N.C. 709, 370 S.E.2d 533 (1989). In State v. Carter,

the North Carolina Supreme Court held that there is no good faith exception under its state constitution, Article I, Section 20, which the defendant notes is similar to the Virginia State Constitution, Article I, §10. The Court in State v. Carolina, said "if a good faith exception is to be applied to this public policy, let it be done by the Legislature, the body politic responsible for the formation and expression of matters of public policy." The Court in State v. Carolina, indicated that the public policy of the State is to exclude evidence obtained in violation of its Constitution.

The Defendant urges this Court to follow the reasoning of State v. Carolina, supra, and to find that the good faith exception does not apply, and

to suppress the evidence in this case under the Virginia Constitution as there is not probable cause provided in the affidavit for the search warrant.

FRANK CIAMARICONE

By: _____
Of Counsel

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V I R G I N I A:

IN THE CIRCUIT COURT
OF CHESTERFIELD COUNTY

COMMONWEALTH OF VIRGINIA, Plaintiff,

v.

FRANK CIAMARICONE, Defendant.

MOTION TO AMEND MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT

COMES NOW the Defendant, by his undersigned counsel, and moves this Court for permission to amend his motion to suppress to contain the following allegations:

1. That there is no good faith exception under the Virginia Constitution and, therefore, the evidence seized pursuant to the search warrant should be suppressed as there is an absence of probable cause in

the affidavit. A memorandum in support of this motion to suppress has been filed simultaneously herewith.

2. The defendant questions whether the police entered the curtilage of his property without a search warrant and illegally obtained information about buckets and other items on his property, which information was placed in the affidavit for the search warrant. If so, the evidence obtained from illegal entry into the curtilage should be suppressed and all evidence obtained pursuant to the search warrant should be suppressed. The curtilage of

a dwelling house is the space necessary and convenient, habitually used for family purposes and carrying on of domestic employment; yard, garden, or field which is near to and used in connection with the dwelling. Wellford v. Commonwealth, 227 Va 297 (1984) (warrantless search of defendant's cornfield was proper). When a fence is erected around dwelling and outbuildings, it ordinarily defines curtilage, particularly in rural areas. Patler v. Commonwealth, 211 Va 448 (1970). Where officer, having probably cause, enter premises and secure premises

from within to preserve status quo while others, in good faith, are in process of obtaining warrant, they do not violate Fourth Amendment's prescription against unreasonable seizures. Crosby v. Commonwealth, 6 Va. App. 193 (1988).

FRANK CIAMARICONE

By: _____
Of Counsel

Charles C. Cosby, Jr.
BOONE, BEALE, CARPENTER
& COSBY
27 North Seventeenth Street
Richmond, VA 23219
(804) 780-1729

THE COURT: Good morning.

MR. COSBY: Good morning, Your Honor.

MR. LINDSEY: Good morning.

THE COURT: I have received your proposed amendment to your motion.

MR. COSBY: Yes, sir, Your Honor.

THE COURT: And I've considered your memorandum, and unfortunately, I'm prepared to give you the same ruling that I had before.

MR. COSBY: All right. Well, I appreciate the Court reading the memorandum --

THE COURT: Certainly.

MR. COSBY: -- and considering the matter.

THE COURT: It was excellently done.

SUPREME COURT OF THE UNITED STATES

No.

A-27

Frank Paul Ciamaricone,

Petitioner

v.

Virginia

O R D E R

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to an including August 20, 1993.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 9th day of July, 1993.

Petition for Appeal to the Court of Appeals of Virginia and the Supreme Court of Virginia, Pages 6, 7, 8

LAW, ARGUMENT & AUTHORITY

1. The trial court erred in denying Defendant's Motion to Suppress the evidence seized from inside Defendant's home when the search warrant affidavit was insufficient on its face to raise probable cause that seizable items would be found there.

It is clear that from the Fourth Amendment of the United State Constitution and the Virginia Constitution that an affidavit must provide the magistrate with the substantial basis for determining the existence of probable cause. In the instant case, the affidavit fails to so provide and is defective on its face.

"The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The duty of the reviewing court is "simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed. Id., at 238-239 (quoting Jones v. United States, 362 U.S. 257, 271 (1960).

The reviewing court must consider the "veracity or reliability" of the affiant and informant and whether the

information supplied was supported by a sufficient "basis of knowledge". Miles v. Commonwealth, 13 Va. App. 64 (1991). See also, Corey v. Commonwealth, 8 Va. App. 281, 289, 381 S.E.2d 19, 23 (1989). In the instant case, Defendant submits only that the information on the affidavit was not supported by a "sufficient basis of knowledge" to provide the magistrate with a "substantial basis" for concluding that probable cause existed to issue a search warrant on Defendant's home. The affidavit (attached) establishes that Chesterfield County Detective Bromseth of the Narcotics Unit was flying over the area behind Defendant's back fence when he spotted 31 marijuana plants growing in black plastic buckets in a field (Tr. 40-43). According to

Bromseth, the buckets of marijuana were surrounded by wire, and there was a worn footpath from the marijuana garden to Defendant's home. There were no other paths around. Bromseth saw similar pots and wire in Defendant's fenced yard. The affiant took this information and coupled it with his unsubstantiated "knowledge that tools, seeds, and other items related to the manufacturing of marijuana plants are normally kept inside the residences of persons growing marijuana" (see number 4 of affidavit). This formed the totality of the basis of knowledge which the magistrate had to consider in reaching a determination that probable cause existed. This was not a substantial enough basis upon which to reasonably conclude that there was probable cause to believe that

contraband would be found inside Defendant's residence.

Good Faith Exception:

Once a determination is made that the magistrate lacked a "substantial basis for finding that probable cause existed, the Court must determine if the good faith exception to the exclusionary rule, announced in United States v. Leon, 468 U.S. 897 (1984), is applicable. The good faith exception will not apply where "... (3) the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence unreasonable ..." Atkins v. Commonwealth, 9 Va. App. 462, 464, 389 S.E.2d 179, 180 (1990) (citing Leon, 468 U.S. at 923).

It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched. No such facts were stated in the instant affidavit. The affiant merely stated his hunch that there might be contraband found there. No particularized information as to contraband existing inside Defendant's home appears on the affidavit. Thus, any official belief in the existence of probable cause must be considered unreasonable. Leon does not, then, apply.

SEARCH WARRANT

Commonwealth of Virginia

In re/V.

224 Granite Springs

Richmond, Virginia

Located in Chesterfield County

To any policeman of a county, city or town:

You are hereby commanded in the name of the Commonwealth to forthwith search either in day or night

224 Granite Springs Road, Richmond, Virginia, located in the county of Chesterfield. The location is further described as a brick rancher single family dwelling with the numbers 224 clearly affixed to the front of the residence.

for the following property, objects and/or persons:

Drugs and drug paraphernalia as described in the 1970 drug control act of Virginia as amended. To Wit: marijuana plants, seeds, tools, potting materials, literature on growing marijuana, and any other items related to the cultivation of marijuana.

You are further commanded to seize said property, persons, and/or objects if they be found and to produce before the Chesterfield Court an inventory of all property, persons and/or objects seized.

This search warrant is issued in relation to an offense substantially described as follows:

Manufacture marijuana with the intent to distribute as described in the 1970 drug control act of Virginia as amended. In violation of Virginia Code 18.2-248.1

I, the undersigned, have found probable cause to believe that the property or person constitutes evidence of the crime identified herein or tends to show that the person(s) named or described herein has committed or is committing a crime, and further that the search should be made, based on the statements in the attached affidavits sworn to by

Det. R.L. Hutchison

August 23, 1991 1550 HRS

AFFIDAVIT FOR SEARCH WARRANT

Applicant: R.L. Hutchison, Jr.
Detective
Chesterfield County
Police Department
Chesterfield, VA 23832

1. A search is requested in relation to an offense substantially described as follows:

Manufacture marijuana with the intent to distribute as described in the 1970 drug control act of Virginia as amended. In violation of Virginia Code Section 18.2-248-1.

2. The place, person, or thing to be searched is described as follows:

224 Granite Springs Road, Richmond, Virginia located in the county of Chesterfield. The Location is further described as a brick

rancher single family dwelling with the numbers 224 clearly affixed to the front of the residence.

3. The things or persons to be searched for are described as follows:

Drugs and drug paraphernalia as described in the 1970 drug control act of Virginia as amended. To wit: marijuana plants, seeds, tools, potting materials, literature on growing marijuana, and any other items related to the cultivation of marijuana.

4. The material facts constituting probable cause that the search should be made are:

On this date August 23, 1991, while on combined operation with the Va. State P.D., the U.S. Air National Guard and the Chesterfield County

P.D. narcotics unit, approximately thirty one (31) marijuana plants were observed from the air. The plants were potted in black plastic buckets with wire surrounding the plants. The location where the plants were found is behind the aforementioned location described in section two of this document. Also observed was a worn footpath leading to the rear of the aforementioned location where there are black plastic buckets and wire matching the ones the plants were in located in the yard of the location to be searched. There were no other paths leading to the plants. It is your affiant's knowledge that tools, seeds, and other items related to the

manufacturing of marijuana plants are normally kept inside the residences of persons growing marijuana.

5. The object, thing or person searched constitutes evidence of the commission of such offense.

6. I was advised of the facts set forth in this affidavit, in whole or in part, by an informer. This informer's credibility or the reliability of the information may be determined from the following facts:

The marijuana plants that were observed from the air were observed by Det. Bromseth, Chesterfield County Police narcotics unit. Det. Bromseth also observed the other information related in Section 4 of this document. Det. Bromseth is a

police officer for the past 7 years and assigned to the state narcotics unit for the past 3-1/2 years. Det. Bromseth has been trained by both Federal and State narcotics instructors in the identification of marijuana. Your affiant has been a police officer for Chesterfield P.D. for the past 11 years and assigned to the vice and narcotics unit for the past 6 years and has also been trained in the identification and investigation of marijuana cultivation.

The statements above are true and accurate to the best of my knowledge and belief.

DETECTIVE R.L. HUTCHISON, JR.

Subscribed and sworn to
before me this day.

8/23/91 1545 hrs.